Sarawak Electricity Supply Corp v Celcom (M) Sdn Bhd

HIGH COURT (KUCHING) — SUIT NO 22–103 OF 2001–I
IAN CHIN J
11 OCTOBER 2001

Arbitration *— Agreement — Reference of dispute — Whether existence of real dispute — — Whether construction issue for court to decide — Initiation of legal proceedings, whether waiver of right to have matter arbitrated — Whether application for stay should be dismissed*

The agreement between Sarawak Electricity Supply Corp ('the plaintiff') and Celcom (M) Sdn Bhd ('the defendant') provided for 'any dispute or difference touching any clauses therein contained or the construction thereof to be referred to arbitration'. The dispute was as to the meaning of the term 'composition or arrangement with its creditors'. The plaintiff submitted that: (i) there were no real disputes to be referred to arbitration because the court had, in the proceedings for an injunction, dealt with the issue of whether a deferment of the payment of debt amounts to a 'composition or arrangement with its creditors', and had found for the plaintiff's argument that it did; (ii) since the issue involved construction, and it being a question of law, the court was in a better position to deal with the question; (iii) the plaintiff had already filed an application under O 14A of the Rules of the High Court 1980 to have the construction of the term determined and that they would be making an application to have the question determined by the court under s 22 of the Arbitration Act 1952 ('the Act'); and (iv) the right to have the matter arbitrated had been waived by the defendant and/or the defendant was unwilling to proceed to arbitration, in that the defendant, inter alia, despite requesting for arbitration, had agreed to sell the shares, negotiated the price and had not appointed an arbitrator up to date.

Held, dismissing the application for a stay, with costs to the plaintiff:

(1) At the proceedings for injunction, the court was only making a preliminary or interlocutory finding that it was arguable that the term 'composition or arrangement with its creditors' had the meaning put forth by the plaintiff. Therefore, it was in no way conclusive as to render the matter a non-issue (see p 494A–B). Furthermore, the submission that the court was in a better position to deal with the question alone was not a sufficient ground for refusing to give effect to what the parties had agreed, that was, to refer the matter to arbitration (see p 494C).

(2) As for s 22 of the Act, the section supports the submission that notwithstanding the dispute being a question of law, the arbitrators were still qualified to decide on the dispute, and it was for the arbitrators to decide whether the matter should or should not be referred to the court. It was only after the arbitrators had

made a decision one way or the other that s 22 of the Act became relevant (see p 494G–H).

(3) There could be no waiver in the absence of an intention to waive (see p 495E); *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374. Such an intention could not be inferred by the mere fact that the defendant entered into negotiation regarding the price of the shares which the plaintiff sought to buy from the defendant and which negotiation failed, because before a deal was struck the parties were maintaining their respective rights while negotiating. The right that was maintained included the right to have the dispute referred to arbitration and the preservation of such rights negated any intention to give it up. As for the initiation of the legal proceedings, they were taken in response to proceedings taken to wind up the defendant and if anything, such conduct showed an intention on the part of the defendant to be asserting their right rather than giving up, and consequently waiving, such right (see p 495F–G).

(4) Under s 6 of the Act, the defendant must satisfy that it was ready and willing to do all things necessary to the proper conduct of the arbitration. The defendant attempted to transfer away the shares, the subject-matter of the dispute which the defendant wanted arbitrated, which the court prevented by an injunction. Such conduct of the defendant exhibited an unwillingness to proceed to arbitration which belied the supposed willingness as conveyed by the letter dated 24 November 2000 demanding an arbitration. Such unwillingness persisted even up to now as the defendant had still to name the arbitrator (see p 496A–B).

[Bahasa Malaysia summary

Perjanjian antara Sarawak Electricity Supply Corp ('plaintif') dan Celcom (M) Sdn Bhd ('defendan') memperuntukkan bagi 'sebarang pertikaian atau perbezaan yang menyentuh mana-mana fasal yang terkandung di dalamnya atau pembentukannya hendaklah dirujuk kepada timbangtara'. Pertikaian tersebut adalah berhubung dengan maksud ungkapan 'komposisi atau pengaturan dengan pemiutang-pemiutangnya'. Plaintiff berhujah bahawa: (i) tidak terdapat pertikaian-pertikaian sebenarnya untuk dirujuk kepada timbangtara kerana mahkamah telah, dalam prosiding untuk satu injunksi, melayan isu sama ada penundaan pembayaran hutang membawa kepada suatu 'komposisi atau pengaturan dengan pemiutang-pemiutangnya', dan telah mempersetujui hujahan plaintif bahawa ia adalah sesungguhnya; (ii) oleh kerana isu tersebut melibatkan pembentukan, dan ia merupakan suatu persoalan undang-undang, mahkamah berada dalam kedudukan yang lebih baik untuk melayan persoalan tersebut; (iii) plaintif telah pun memfailkan suatu permohonan di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi

1980 untuk menentukan pembentukan terma tersebut dan bahawa mereka akan membuat satu permohonan bagi persoalan tersebut ditentukan oleh mahkamah di bawah s 22 Akta Timbangtara 1952 ('Akta tersebut'); dan (iv) hak untuk perkara tersebut ditimbangtarakan telah diketepikan oleh defendan dan/atau defendan tidak bersedia untuk meneruskan kepada timbangtara, iaitu defendan, antara lainnya, meskipun meminta timbangtara, telah bersetuju untuk menjual saham-saham mereka, merundingkan harganya dan telah tidak melantik seorang penimbangtara sehingga ke hari ini.

Diputuskan, menolak permohonan untuk satu penggantungan, dengan kos kepada plaintif:

(1) Di prosiding untuk injunksi, mahkamah hanya membuat satu keputusan awal atau interlokutori bahawa ia boleh dihujahkan bahawa maksud ungkapan 'komposisi atau pengaturan dengan pemiutang-pemiutangnya' telah dikemukakan oleh plaintif. Oleh itu, ia tidak dalam sebarang keadaan muktamad untuk menjadikan perkara tersebut sesuatu yang bukan isu (lihat ms 494A–B). Lagipun, penghujahan bahawa mahkamah berada dalam kedudukan yang lebih baik untuk melayan persoalan itu sahaja bukannya alasan yang memadai untuk menolak penguatkuasaan apa yang pihak-pihak tersebut telah persetujui, iaitu, untuk merujuk perkara tersebut kepada timbangtara (lihat ms 494C).

(2) Berhubung s 22 Akta tersebut, seksyen tersebut menyokong penghujahan bahawa meskipun pertikaian tersebut merupakan satu persoalan undang-undang, penimbangtara-penimbangtara tersebut masih layak untuk memutuskan pertikaian tersebut, dan adalah terpulang kepada penimbangtara-penimbangtara tersebut untuk memutuskan sama ada perkara tersebut seharusnya atau tidak seharusnya dirujuk kepada mahkamah. Ia adalah hanya selepas penimbangtara-penimbangtara telah membuat keputusan sama ada dengan cara itu atau selainnya maka s 22 Akta tersebut menjadi relevan (lihat ms 494G–H).

(3) Tidak akan terdapat pengenepian dalam ketiadaan suatu niat untuk mengenepikan (lihat ms 495E); *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374. Niat yang sedemikian tidak boleh dirujuk hanya dengan fakta bahawa defendan telah memasuki perundingan berhubung harga saham-saham tersebut yang plaintif berusaha untuk beli daripada defendan dan perundingan yang mana telah gagal, kerana sebelum suatu persetujuan dicapai pihak-pihak tersebut telah mengekalkan hak mereka masing-masingnya ketika berunding. Hak yang dipertahankan termasuk hak untuk merujuk pertikaian kepada timbangtara dan pengekalan hak sedemikian menidakkan sebarang niat untuk melepaskannya. Berhubung dengan permulaan prosiding, ia telah diambil sebagai tindakbalas kepada

prosiding yang diambil untuk menggulung defendan dan jika ada, perlakuan yang sedemikian menunjukkan satu niat oleh defendan untuk menegaskan hak mereka dan bukannya melepaskannya, dan akibatnya mengenepikan, hak yang sedemikian (lihat ms 495F–G).

(4) Di bawah s 6 Akta tersebut, defendan mesti menunjukkan bahawa ia bersedia dan rela untuk melakukan semua perkara yang perlu untuk pengendalian sempurna timbangtara tersebut. Defendan cuba untuk memindahkan saham-saham tersebut, hal perkara pertikaian yang hendak ditimbangtarakan oleh defendan yang mana dihalang oleh mahkamah melalui satu injunksi. Perlakuan defendan yang sedemikian menunjukkan ketidaksediaan untuk meneruskan kepada timbangtara yang mana menafikan kesediaan yang dijangkakan seperti mana yang disampaikan oleh surat bertarikh 24 November 2000 yang menuntut timbangtara. Ketidaksediaan sedemikian berterusan sehingga kini kerana defendan masih belum menamakan penimbangtara tersebut (lihat ms 496A–B).]

Notes

For cases on reference for dispute, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 886–889.

Cases referred to

Jak Kwang Builders & Developers Sdn Bhd v Pembinaan TJL (Sarawak) Sdn Bhd [2001] 1 MLJ 384 (folld)

Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374 (refd)

Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat [1995] 3 MLJ 273 (folld)

Legislation referred to

Arbitration Act 1952 ss 6, 22

Rules of the High Court 1980 O 14A

HC Sim (*Reddi & Co*) for the plaintiff.

James Lo (*George Lo & Partners*) for the defendant.

Ian Chin J: The agreement between the plaintiff, Sarawak Electricity Supply Corporation, and the defendant, Celcom (Malaysia) Sdn Bhd, provides for 'any dispute or difference touching any clauses therein contained or the construction thereof to be referred to arbitration'. The dispute is as to the meaning of the term 'composition or arrangement with its creditors'. Why should it not be referred to arbitration? The plaintiff argues that it should not and they carry the burden of establishing why it should not and the following reasons were put forth.

The plaintiff says there are no real disputes to be referred to arbitration because this court had, in the proceedings for an injunction, dealt with the issue of whether a deferment of the payment of debt amounts to a 'composition or arrangement with its creditors', and had found for the plaintiff's argument that it does. The short answer is that the court was only in that proceeding, making a preliminary or interlocutory finding that it was arguable that it has the meaning put forth by the plaintiff. Therefore, it was in no way conclusive as to render the matter a non issue. It remains to be determined what the meaning of the term is, which was not the task at that stage of the proceeding. It also is not the duty of this court to critically examine the merits of the case when deciding whether there is sufficient reason within s 6 of the Arbitration Act 1952 ('the Act') not to allow the matter to be referred to arbitration (*Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat* [1995] 3 MLJ 273).

The next reason put forth that since the issue involved construction, and it being a question of law, the court is in a better position to deal with the question. But that alone is not a sufficient ground for refusing to give effect to what the parties have agreed (*Jak Kwang Builders & Developers Sdn Bhd v Pembinaan TJL (Sarawak) Sdn Bhd* [2001] 1 MLJ 384). But the plaintiff says there are more reasons and these are: (i) that they have already filed an application under O 14A of the Rules of the High Court 1980 to have the construction of the term determined; and (ii) that they would be making an application to have the question determined by the court under s 22 of the Act. The validity of those reasons depend on whether they fall within those narrow class of cases which form the exception to the general rule that a stay would be granted where there is an agreement to arbitrate. In this aspect of the law, *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat* says this:

> ... given an agreement to arbitrate and the satisfaction of conditions set out in s 6 of the Act, a court should lean towards the grant of a stay. This, in our judgment, is the correct approach. The residual discretion which the court retains is limited to a very narrow class of cases, such as those involving fraud or where there is, on a proper construction of the arbitration clause, no dispute that falls within its purview or where the third party procedure under the rules of court will most probably be resorted to.

As for the provision of s 22 of the Act, it goes more to support the fact that notwithstanding the dispute being a question of law, the arbitrators are still qualified to decide on the dispute, and it is for the arbitrators to decide whether the matter should or should not be referred to the court. After all, a lot of arbitrators are legally qualified, and it is a notorious fact that quite a number are retired judges of the Court of Appeal and the Federal Court which make them equally suitable as the court to decide on the question of law. In any event s 22 of the Act does not fall to be considered at this stage and this court should not venture to guess whether the arbitrators would or would not refer the question to the court. It is only after the arbitrators had made a decision one way or the other that s 22 of the Act becomes relevant. Even when the matter goes to the High Court, a relevant consideration to take into account would be whether the arbitrators are equally suitable as

A the High Court to determine the question and, as mentioned earlier, it would be impossible to maintain that the arbitrators are not, if the arbitrators are former judges of the judiciary. This means that the High Court will not necessarily act under s 22 of the Act to deprive a party's right to insist on arbitration. If the mere existence of s 22 of the Act is a reason for not going for arbitration, then it follows that every question of law would B be exempted from arbitration thus carving out an exception to the said general rule, which it cannot be said the legislators had intended. The position is the same with O 14A of the RHC, and that is whether the arbitrators are equally suitable for the determination of the question of law. That provision cannot be a factor for the court's consideration in deciding C whether to stay an action.

The plaintiff then argued that the right to have the matter arbitrated had been waived. The matters urged as constituting waiver are these:

(a) the defendant despite requesting on 24 November 2000 for arbitration nevertheless agreed to sell their shares by a letter of D 3 January 2001;

(b) thereafter the defendant negotiated the price;

(c) up to date, the defendant did not follow up the request for submission to arbitration with steps relating to the appointment of arbitrators; and

(d) instead, the defendant presented a petition under which the defendant E obtained an injunction against the plaintiff from presenting a winding-up injunction against it and against the plaintiff from exercising its right of lien over the shares of the defendant.

It has been held in *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 that there can be no waiver in the absence F of an intention to waive. Can such an intention be inferred by the mere fact that the defendant entered into negotiation regarding the price of the shares which the plaintiff sought to buy from the defendant and which negotiation failed? Clearly not, because before a deal is struck the parties are maintaining their respective rights while negotiating. The right that was maintained includes the right to have the dispute referred to arbitration and G the preservation of such rights negates any intention to give it up. As for the initiation of the legal proceedings, they were taken in response to proceedings taken to wind up the defendant and if anything, such conduct shows an intention on the part of the defendant to be asserting their right rather than giving up, and consequently waiving, such right. As for the failure on the part of the defendant to take follow up actions for the H appointment of an arbitrator or arbitrators, it is more relevant to consider that point in relation to the issue of whether the defendant was ready and willing to submit to arbitration, rather than whether it shows an intention to waive the right to arbitration.

This contention has to be considered with the further contention of the I plaintiff that the defendant is not genuine about its willingness to go to arbitration, which willingness is a precondition under s 6 for a stay of proceedings.

Under s 6 of the Act, one of the conditions which the defendant must satisfy is that they 'at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration'. The defendant had demanded arbitration by their letter of 24 November 2000, and up to now had not followed up with action to name an arbitrator. Not only that, the defendant attempted to transfer away the shares, the subject matter of the dispute which the defendant wants arbitrated, which the court prevented by an injunction. Such conduct of the defendant exhibited an unwillingness to proceed to arbitration which belies the supposed willingness as conveyed by the letter. Such unwillingness persisted even up to now as the defendant has still to name the arbitrator.

In the premises, the application for a stay is dismissed with costs to the plaintiff.

Application dismissed.

Reported by Wong Ee Lynn